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Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers

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Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers

This simple statement is the essence of Megan's Law: The right to know.[1]

- Maureen Kanka, parent of a murdered child

I. Introduction

Under her state's version of Megan's Law,[2] Janet, the mother of three small children is notified that her new neighbor is a "sexually violent predator."[3] Specifically, she is informed that her neighbor spent several years in prison for committing violent sexual

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1. *Pending Crime Bills, 1996: Testimony Before the Subcomm. on Crime of the House Judiciary Comm.*, 104th Cong. (1996), *available in* 1996 WL 117175 (letter of Maureen Kanka).

2. Under the Jacob Wetterling Crimes Against Children and Sexual Violent Offenders Registration Program, 42 U.S.C. § 14071(d) (1994), *as amended by* Act of May 17, 1996, Pub. L. No. 105-145, § 2, 110 Stat. 1345; Act of Oct. 3, 1996, Pub. L. No. 104-236, §§ 3-7, 110 Stat. 3096, 3097, all fifty states are required to implement procedures for notifying people when potentially dangerous convicted sex offenders move into their neighborhoods.

3. A "sexually violent predator" is defined as "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 U.S.C. § 14071(a)(3)(C). "Predatory" offenses are those which are "directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization." 42 U.S.C. § 14071(a)(3)(E).

A "sexually violent offense" is:

> Any offense that consists of aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18 or as described in the State Criminal Code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of Title 18 or as described in the State Criminal Code).

42 U.S.C. § 14071(a)(3)(B).

acts against children and that the authorities believe he will continue to engage in such conduct in the future. Janet decides to move. She contacts her real estate broker and puts her house up for sale. Janet is concerned, however, as to what to tell potential purchasers about her neighbor. She wonders if potential purchasers have the right to know that there is a dangerous sexual predator in the neighborhood before they move in. Janet's real estate broker shares her concern. Neither the federal version of Megan's Law nor the varying state versions of Megan's Law specifically address this question.[4]

If potential purchasers are given the right to know about the presence of dangerous sexual predators in the neighborhood, it may decrease the selling price of Janet's home or prevent her from selling her house altogether.[5] However, if potential purchasers are not given the right to know, a new family could move into the neighborhood unaware that they are buying a house which will put their children into a position of danger.[6] Such a result goes against the purpose of sex offender notification laws.[7] These laws are intended to provide people with information that will allow them and their children to avoid becoming the victims of a violent sexual predator.[8]

This comment analyzes the duty of residential sellers and real estate brokers[9] to disclose unfavorable information to potential purchasers in the context of sex offender notification statutes. In Part II of this comment, the history, implementation, and policy behind sex offender notification statutes are discussed. Part III analyzes the duties of sellers and real estate brokers to disclose

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4. *See* Robert Schwaneberg, *Megan's Law May Force Home Sellers to Notify Buyers About Sex Offenders*, STAR-LEDGER (Newark, N.J.), July 22, 1996, at 1.

5. *See* James Ahearn, *When Your Prospective Neighbor is a Sex Offender*, RECORD (Bergen County, N.J.), July 24, 1996, at N7.

6. Neither the federal Megan's Law nor the varying state versions of Megan's Law specifically provide for the notification of potential home purchasers of the presence of dangerous sex offenders in the neighborhood. *See* Schwaneberg, *supra* note 4, at 1.

7. "Megan's Law is an effort to facilitate police protection of the community, to increase the vigilance of parents in protecting their children from sex offenders, and to discourage reoffense by sex offenders." Artway v. Attorney General of N.J., 876 F. Supp. 666, 690 (D.N.J. 1995).

8. *See id.*

9. As used in this comment, a real estate broker or agent is a person employed to negotiate the sale of real property which belongs to other people. *See* 12 C.J.S. *Brokers* § 2 (1980). A realtor is a real estate broker who is a member of the National Association of Realtors. *See* BLACK'S LAW DICTIONARY 1264 (6th ed. 1990).

unfavorable information to prospective purchasers, including the duty to disclose the presence of a sexual predator in the neighborhood. Finally, this comment recommends that sex offender notification statutes specifically require sellers and real estate brokers to notify potential purchasers of the presence of sex offenders in the neighborhood.

II. Sex Offenders Notification Statuses

A. History

1. The Washington Community Protection Act.—On May 20, 1989, Earl Shriner ambushed a seven year old boy playing in a neighborhood park in Washington.[10] Shriner raped and mutilated the boy.[11] Following this heinous assault, the public learned that Shriner had a twenty-four year history of violent sexual assaults against children.[12] The public also learned that Shriner had been released from prison in 1987[13] despite the fact that prison authorities felt he would continue his violent sexual attacks against children.[14]

In response to the public outcry following these revelations, the Washington Community Protection Act[15] was enacted.[16] The

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10. *See* Richard Jerome et al., *Megan's Legacy*, PEOPLE WKLY., Mar. 20, 1995, at 46.

11. After raping the boy, Shriner cut off the boy's penis and stabbed him in the back. *See id.* at 48; James Popkin, et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 66. The boy survived the attack and, with reconstructive surgery, has made an almost complete physical recovery. *See* Jerome, *supra* note 10, at 49.

12. *See* Jerome, *supra* note 10, at 49. Moreover, while in prison for an earlier conviction, Shriner had confided to a cellmate that he wanted to buy a van and customize it with cages so that he could more easily sexually molest and murder children. *See id.*

13. Shriner had been released in 1987 after serving a ten-year term for assaulting and abducting two 16 year old girls. *See* David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 527 (1992).

14. *See* Deborah Nelson, *'We're in Jeopardy,' Says Victim's Mother*, SEATTLE TIMES, Aug. 27, 1995, at A15. Four months after his release, Shriner was arrested for stabbing a 16 year old boy. *See* Boerner, *supra* note 13, at 528. Through a plea bargain, Shriner was sentenced to only 90 days for the attack and subsequently released. *See id.* In January of 1988, Shriner was arrested for tying a 10 year old boy to a fence post and beating him. *See id.* This time Shriner received a sixty-seven day sentence following a plea bargain. *See id.*

15. WASH. REV. CODE ANN. §§ 9A.44.130-.140, 4.24.550, 71.09.010-.230) (West Supp. 1997) (1990 Wash. Laws, Ch. 3, § 117).

16. *See* Young v. Weston, 898 F. Supp. 744, 746 n.1 (W.D. Wash. 1995). The Act provides, *inter alia*, for registration of convicted sex offenders, compensation to crime victims, civil commitment of sexual predators, and increased penalties for sex offenders. *See In re* the Personal Restraint Petition of Andre Brigham Young, 857 P.2d 989, 992 (Wash. 1993).

Act contained the first sex offender notification provision[17] in the United States.[18] Under the Act, law enforcement officials were authorized to release information about convicted sex offenders who posed a potential danger to the community.[19]

2. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.—Cases like Earl Shriner's continued to come to the public's attention ultimately leading to a call for a federal solution to the problem of repeat sex offenders.[20] Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act[21] in 1994 in response to this call. The Jacob Wetterling Act required states to establish procedures for the registration of individuals convicted of crimes against children or of sexually violent offenses with designated state law enforcement agencies.[22] The Jacob Wetterl-

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17. *See* WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1997).

18. *See* Jerome, *supra* note 10, at 48.

19. *See* WASH. REV. CODE ANN. § 4.24.550(1) (West Supp. 1997).

20. *See* 142 CONG. REC. H4451, H4452 (daily ed. May 7, 1996) (statement of Rep. McCollum).

21. 42 U.S.C. § 14071 (1994). The Jacob Wetterling Act was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. *See id.* The Act was named in honor of an 11 year old boy who was abducted by a stranger at gunpoint in Minnesota in 1989. *See* Doe v. Pataki, 919 F. Supp. 691, 694 (S.D.N.Y. 1996); 142 CONG. REC. H4451, H4456 (daily ed. May 7, 1996) (statement of Rep. Ramstad). Jacob Wetterling has never been found. *See id.* at H4452.

22. *See* 42 U.S.C. § 14071(a)(1). Any state which did not comply with the registration provisions was to be denied a percentage of federal law enforcement funding. *See id.* § 14071(f).

As of January 1997, all 50 states, with the exception of Massachusetts, have enacted sex offender registration laws. *See* ALA. CODE §§ 13A-11-200 to -203 (1994); ALASKA STAT. §§ 11.56.840, 12.55.148, 12.63.010-.100 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3824 (West 1989 & Supp. 1996); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie 1995); CAL. PENAL CODE §§ 290-290.5 (West 1988 & Supp. 1997); COLO. REV. STAT. ANN. §§ 18-3-412 to -412.5 (West Supp. 1996); CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1997); DEL. CODE ANN. tit. 11, § 4120 (1995 & Supp. 1996); FLA. STAT. ANN. §§ 775.21-.23 (West Supp. 1997); GA. CODE ANN. § 42-1-12 (Harrison Supp. 1997); HAW. REV. STAT. § 707-743 (Supp. 1997); IDAHO CODE §§ 18-8301 to -8311 (1997); 730 ILL. COMP. STAT. ANN. 150/1-10 (West 1992 & Supp. 1997); IND. CODE ANN. §§ 5-2-12-1 to -13 (Michie Supp. 1996); IOWA CODE ANN. §§ 692A.1-.15 (West Supp. 1997); KAN. STAT. ANN. §§ 22-4902 to -4907 (Supp. 1996); KY. REV. STAT. ANN. §§ 17.500-.540 (Michie 1995); LA. REV. STAT. ANN. §§ 15:540-:549 (West Supp. 1997); ME. REV. STAT. ANN. tit. 34-A, §§ 11001-11005, 11121, 11141-11144 (West Supp. 1996); MD. ANN. CODE art. 27, §§ 692B, 792 (1996); MICH. COMP. LAWS ANN. §§ 28.721-.732 (West Supp. 1997); MINN. STAT. ANN. §§ 243.165-.166 (West Supp. 1997); MISS. CODE ANN. §§ 45-33-1 to -19 (Supp. 1997); MO. ANN. STAT. §§ 566.600-.625 (West Supp. 1997); MONT. CODE ANN. §§ 46-23-501 to -508 (1995); NEB. REV. STAT. §§ 29-2922 to -2936 (1995); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1997); N.H. Rev. Stat. Ann. §§ 632-A:11 to -A:19 (1996); N.J. STAT. ANN. §§ 2C: 7-1 to -11 (West 1995 & Supp. 1997);

ing Act also authorized the states to release the information collected if such a release was necessary to protect the public.[23] States, however, were not required to do so.[24] Few states chose to enact community notification laws following enactment of the Jacob Wetterling Act.[25]

3. Megan's Laws.—In July of 1994, New Jersey was one of the states which had not yet enacted a sex offender notification law. This changed after seven year old Megan Kanka's body was found in a park near her New Jersey home.[26] Megan had been raped and murdered. The man arrested for the crime was Jesse K. Timmendequas, Megan's next-door neighbor.[27] It was reported that Timmendequas had lured Megan into his house by promising to show her a puppy.[28] It was also reported that Timmendequas had twice been convicted of child molestation and, in one of the previous attacks, he had nearly killed one of his victims.[29] No one in Megan's neighborhood had been aware of Timmendequas' past history of violent sexual acts against children.[30] The public and Megan's parents blamed Megan's tragic death on this lack of awareness.[31]

N.M. STAT. ANN. §§ 29-11A-1 to -7 (Michie Supp. 1996); N.Y. CORRECT. LAW §§ 168a-168v (McKinney Supp. 1997); N.C. GEN. STAT. §§ 14-208.5-.13 (Supp. 1996); N.D. CENT. CODE § 12.1-32-15 (Supp. 1997); OHIO REV. CODE ANN. §§ 2950.01-.99 (Banks-Baldwin 1997); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West Supp. 1997); OR. REV. STAT. §§ 181.517-.519 (1993); 42 PA. CONS. STAT. ANN. §§ 9791-9799.6 (West Supp. 1997); R.I. GEN. LAWS § 11-37-16 (Supp. 1997); S.C. CODE. ANN. §§ 23-3-400 to -490 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS §§ 22-22-30 to -41 (Michie Supp. 1997); TENN. CODE ANN. §§ 40-39-101 to -108 (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1997); UTAH CODE ANN. § 77-27-21.5 (1995 & Supp. 1997); Vt. Stat. Ann. tit. 13, §§ 5401-5413 (Supp. 1997); VA. CODE ANN. §§ 19.2-298.1 to -298.4 (Michie 1995 & Supp. 1997); WASH. REV. CODE ANN. §§ 9A.44.130-.140 (West Supp. 1997); W. VA. CODE §§ 61-8F-1 to -10 (Supp. 1997); WIS. STAT. ANN. § 175.45 (West Supp. 1996); WYO. STAT. ANN. §§ 7-19-301 to -306 (Michie 1997).

23. *See* Joel B. Rudin, *Megan's Law*, ABA CRIMINAL JUSTICE SECTION, Fall 1996, at 4.

24. *See id.*

25. *See* 142 CONG. REC. H4451, H4453 (daily ed. May 7, 1996) (statement of Rep. Zimmer).

26. *See Pending Crime Bills*, *supra* note 1 (letter of Maureen Kanka).

27. *See* Artway v. Attorney General of N.J., 83 F.3d 594, 595 (3d. Cir. 1996).

28. *See id.* at 596.

29. *See* Diane Carman, *We Deserve Warning When Sex Offenders Come to Town*, DENV. POST, June 1, 1996, at E1.

30. *See* Leo Rennert, *Clinton Signs Predator Law, Defends Its Constitutionality*, FRESNO BEE, May 18, 1996, at A4.

31. Megan's mother stated, "If I had been aware of [Timmendequas'] record, my daughter would be alive. I would never have allowed her to cross the street." Jerome, *supra*

Megan's parents were outraged that the authorities had not warned anyone about the dangerous proclivities of a convicted child molester who lived in a neighborhood full of children.[32] First in New Jersey and then nationally, the Kankas led a movement to ensure that people would receive information about dangerous sexual predators who lived in their neighborhoods so that other parents could protect their children.[33] Their efforts helped lead to the passage of a community notification statute in New Jersey.[34] This statute came to be known as Megan's Law.[35]

The publicity and public outcry that followed Megan's death also led the federal government to re-examine its policy regarding repeat sex offenders.[36] Looking with approval upon community notification laws such as New Jersey's Megan's Law, Congress was dismayed that the states seemed unwilling to act under the authority given to them by the Jacob Wetterling Act to voluntarily release information collected under the sex offender registration provisions.[37] Consequently, in May of 1996, the Violent Crime Control and Law Enforcement Act of 1994[38] was amended to require states to release such information.[39] This federal amend-

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note 10, at 46.

32. *See id.*

33. *See* Rudin, *supra* note 23, at 3; Bradley Inman, *Disclosure Laws Getting Complicated*, SAN DIEGO UNION-TRIB., Sept. 15, 1996, at H1. Adding to the sense of outrage over Megan's murder was the fact that two other men living in the house with Timmendequas were also convicted child molesters whom Timmendequas had met while in prison. *See Artway*, 83
F.3d at 596.

34. *See* N.J. STAT. ANN. § 2C:7-6 to :7-11 (West 1995 & Supp. 1997); Rudin, *supra* note 23, at 4.

35. *See* Rudin, *supra* note 23, at 1.

36. *See* 142 CONG. REC. S4921, S4921 (daily ed. May 9, 1996) (statement of Sen. Dole) (noting that the fact that "not all states have taken the necessary steps to require [sex offender] notification is a tragedy in the making"); The President's Radio Address, 32 WEEKLY COMP. PRES. DOC. 1111 (June 22, 1996) (stating that "[t]oo many children and their families have paid a terrible price because parents didn't know about the dangers hidden in their own neighborhood"). President Clinton further noted that while the Jacob Wetterling Act "gave States the power to notify communities about child sex offenders . . . that wasn't enough . . . ." *Id.*

37. *See* 142 CONG. REC. H4451, H4453 (daily ed. May 7, 1996) (statement of Rep. Zimmer).

38. *See* 42 U.S.C. § 14071 (1994).

39. *See id.* § 14071(d). A state that does not implement sex offender notification laws will be ineligible to "receive 10 percent of the funds that would otherwise be allocated to the [s]tate under [the Omnibus Crime Control and Safe Street Act of 1968, 42 U.S.C. § 3756 (1994)]." *Id.* § 14071(f)(2).

ment was also named Megan's Law, in memory of Megan Kanka.[40] Since the passage of this amendment, all sex offender notification laws, even those which existed before the passage of the federal Megan's Law, are commonly referred to as "Megan's Laws."[41]

B. State Implementation of Megan's Laws

The federal Megan's Law requires states to enact procedures for notifying the public of the presence of dangerous sex offenders in the community; states which do not comply will lose a percentage of their federal funding.[42] Thus, it can be expected that all fifty states will enact sex offender notification laws.[43] The federal Megan's Law does not, however, specify what kind of notification procedures a state must implement.[44] Thus, a state is allowed to exercise its discretion in determining whether a specific sex offender required to register under its sex offender registration statute poses a danger to the public.[45] The state may also deter-

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40. *See* Rennert, *supra* note 30, at A4. It has been noted that "it is a 'sad commentary' on our society that we continue to name laws after children who have been murdered or abducted." Doe v. Pataki, 919 F. Supp. 691, 693 (S.D.N.Y. 1996)

41. *See id.* at 694.

42. *See* 42 U.S.C. § 14071(d)(2).

43. As of January of 1997, thirty-eight states have enacted sex offender notification laws. *See* ALA. CODE §§ 15-20-20 to -24 (Supp. 1996); ALASKA STAT. § 18.65.087 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-3825 (West Supp. 1997); CAL. PENAL CODE § 290.4 (West Supp. 1997); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1997); CONN. GEN. STAT. ANN. § 54-102s (West Supp. 1997); DEL. CODE ANN. tit. 11, § 4336 (1995 & Supp. 1996); FLA. STAT. ANN. § 775.21 (West Supp. 1997); GA. CODE ANN. § 42-1-12 (Harrison Supp. 1997); IDAHO CODE § 9-340 (Supp. 1997); 730 ILL. COMP. STAT. ANN. 152/120-/125 (West Supp. 1997); IND. CODE ANN. § 5-2-12-11 (Michie Supp. 1996); IOWA CODE ANN. § 692A.13 (West Supp. 1997); KAN. STAT. ANN. § 22-4909 (Supp. 1997); LA. REV. STAT. ANN. §§ 15:540-:549 (West Supp. 1997); ME. REV. STAT. ANN. tit. 34-A, §§ 11101-11144 (West Supp. 1996); MD. ANN. CODE art. 27, § 792 (1996); MINN. STAT. ANN. § 244.052 (West Supp. 1997); MISS. CODE ANN. §§ 45-33-17 to -19 (Supp. 1997); MONT. CODE ANN. § 46-23-508 (1995); NEV. REV. STAT. ANN. § 213.1253-.1257 (Michie 1996); N.H. REV. STAT. ANN. § 651-B:7 (Supp. 1996); N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & Supp. 1997); N.Y. CORRECT. LAW § 168-l (McKinney Supp. 1997); N.C. GEN. STAT. § 14-208.10 (Supp. 1996); N.D. CENT. CODE § 12.1-32-15 (Supp. 1997); OKLA. STAT. ANN. tit. 57, § 584 (West Supp. 1997); OR. REV. STAT. § 181.586 (1993); PA. STAT. ANN. tit. 42, § 9798 (West Supp. 1997); R.I. GEN LAWS § 11-37.1-11 (Supp. 1996); S.C. CODE ANN. § 23-3-490 (Law Co-op. Supp. 1996); TENN. CODE ANN. § 40-39-106 (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1997); UTAH CODE ANN. § 77-27-21.5 (1995 & Supp. 1997); VA. CODE. ANN. § 19.2-390.1 (Michie 1995 & Supp. 1997); WASH. REV. CODE ANN. §§ 4.24.550-.555, 9A.44.130-.140 (West Supp. 1997); W. VA. CODE § 61-8F-5 (Supp. 1997); WIS. STAT. ANN. § 301.46 (West Supp. 1996).

44. *See* 42 U.S.C. § 14071(d).

45. *See* 142 CONG. REC. S4921 (daily ed. May 9, 1996) (statement of Sen Gorton).

mine the extent of disclosure necessary to protect the public from such an offender.[46]

Without specific federal standards, states continue to use various methods in implementing their own Megan's Laws. These various methods of notification fall into four general categories.[47] Type I statutes allow notification whenever law enforcement agencies determine it is necessary for public protection.[48] Washington's Community Protection Act[49] is an example of a type I statute. Couched in broad terms,[50] it leaves local law enforcement agencies the discretion to decide whether to disclose information about a particular sex offender, what information to disclose, and to whom the information should be disclosed.[51]

Type II statutes, in contrast, provide specific lists of people and organizations who are to be notified by law enforcement authorities[52] when a violent sexual predator enters a community.[53]

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46. *See id.*

47. States do not necessarily restrict themselves to using only one of the four methods, some use a combination of the different methods. *See infra* notes 52, 55, 61 and accompanying text.

48. *See* CAL. PENAL CODE § 290.4 (West 1988 & Supp. 1997); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1997); CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1997); FLA. STAT. ANN. § 775.21 (West Supp. 1997); GA. CODE ANN. § 42-1-12 (Supp. 1997); IOWA CODE ANN. § 692A.13 (West Supp. 1997); LA. REV. STAT. ANN. § 15:546 (West Supp. 1997); ME. REV. STAT. ANN. tit. 34-A, § 11143 (West Supp. 1996); MISS. CODE ANN. § 45-33-17(1) (Supp. 1997); MONT. CODE ANN. § 46-23-508 (1995); NEV. REV. STAT. § 213.1253 (1996); N.D. CENT. CODE § 12.1-32-15 (Supp. 1997); OR. REV. STAT. § 181.586 (1993); R.I. GEN. LAWS § 11-37.1-11(B)(3) (Supp. 1996); S.C. CODE ANN. § 23-3-490 (Law Co-op. Supp. 1997); TENN. CODE ANN. § 40-39-106 (Supp. 1996); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1997); WIS. STAT. ANN. § 301.46 (West Supp. 1996).

49. *See* WASH. REV. CODE ANN. § 4.24.550.

50. "Public agencies are authorized to release relevant and necessary information regarding sex offenders and kidnapping offenders to the public when the release of the information is necessary for public protection." *Id.* § 4.24.550(1).

51. The Washington Supreme Court has noted that there is no specific procedure which a local law enforcement agency must follow when releasing sex offender information. *See* State v. Ward, 869 P.2d 1062, 1071 (Wash. 1994). A particular method of notification will be valid as long as it falls within the parameters set up by the Community Protection Act. *See id.* Under the Act, a releasing agency must have evidence of an offender's future dangerousness, have evidence of a likelihood of a repeat offense, or have a threat to the community before disclosure can be made. *See id.* at 1070. Additionally, any information released must be tailored to fit the specific danger each individual sex offender poses on the community and to the public's potential for violence in response to the release. *See id.* Finally, the geographic scope of dissemination must be rationally related to the threat posed by the registered offender. *See id.*

52. In Louisiana, sex offenders are given the duty to disclose their presence to designated people and organizations by sending out letters and taking out newspaper ads. *See* LA. REV. STAT. ANN. § 15:542(B).

Typically included on such lists are neighbors and organizations providing services to children. Pennsylvania's sex offender notification law,[54] which requires notification of neighbors, county children and youth service agencies, local schools and preschools, day care centers, and colleges and universities when a dangerous sex offender moves into an area, is an example of a type II statute.[55]

Type III statutes base notification on an assessment of the risk which each registered sex offender poses to the community.[56] New Jersey's Megan's Law[57] is an example of a Type III statute. Law enforcement authorities notify people and organizations in the community of a sex offender's presence based on the assessed risk that the particular sex offender will repeat his or her crime.[58] If a sex offender poses a low risk of recidivism, only law enforcement

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53. *See* ALA. CODE § 15-20-22(b) (Supp. 1997) (neighbors living in specified proximity to a sex offender); 730 ILL. COMP. STAT. ANN. 152/120 (West Supp. 1997) (schools, child care facilities, and child protection services); IND. CODE ANN. § 5-2-12-11 (West Supp. 1997) (schools and agencies dealing with children); LA. REV. STAT. ANN. § 15:542(B) (West Supp. 1997) (neighbors, schools, police, and courts); MD. ANN. CODE art. 27, § 792 (1996) (community, religious, and other organizations oriented towards children); N.H. REV. STAT. ANN. § 651-B:7 (1996) (any organization where children gather or are supervised); OKLA. STAT. ANN. tit. 57, § 584 (West Supp. 1997) (schools, child-care facilities, and state agencies which work with children); PA. STAT. ANN. tit. 42, § 9798 (West Supp. 1997) (neighbors, children and youth services, schools, day care centers, and colleges and universities); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1, § 3(e) (West 1996) (notice to be published in area newspaper); W. VA. CODE § 61-8F-5 (Supp. 1997) (school superintendents, child protective services officers, and community or religious organizations that provide services to youths).

Illinois and Louisiana also allow for type I statute disclosures. *See supra* note 47 and accompanying text.

54. *See* PA. STAT. ANN. tit. 42, § 9798(b).

55. *See id.*

56. *See* ARIZ. REV. STAT. ANN. § 13-3825 (West Supp. 1997); DEL. CODE ANN. tit. 11, § 4336 (1995); MINN. STAT. ANN. § 244.052 (West Supp. 1997); NEV. REV. STAT. § 213.1253 (1996); N.J. STAT. ANN. § 2C:7-8 (West 1995); N.Y. CORRECT. LAW § 168-l (McKinney Supp. 1997); R.I. GEN. LAWS § 11-37.1-12 (Supp. 1996).

Nevada and Rhode Island also provide for type I statute notification procedures, allowing authorities to broaden notification beyond the risk assessment parameters when necessary for public protection. *See supra* note 47 and accompanying text.

57. *See* N.J. STAT. ANN. § 2C:7-8.

58. Factors relevant in determining a sex offender's risk of recidivism include, *inter alia*, whether the offender is on probation or parole, whether the offender is receiving counseling or other treatment, the offender's response to treatment received, whether the offender is residing with family, the age and general health of the offender, the relationship between the offender and his victims, the offender's use of weapons and violence, and the number of past offenses committed. *See id.* § 2C:7-8(b).

agencies likely to encounter the offender are notified.[59] If a sex offender poses a moderate risk of recidivism, community organizations dealing with children, such as schools and youth organizations, are also notified.[60] If a sex offender is deemed to have a high risk of recidivism, all members of the public likely to encounter the sexual predator must be notified.[61]

Finally, type IV statutes allow law enforcement authorities to release sex offender registration information in response to requests from the public.[62] Generally, requests for sex offender registration information must be made in writing.[63] Two states require persons requesting sex offender registration information to go in person to the location where the records are kept in order to inspect them.[64] Two other states have set up special sex offender

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59. *See id.* § 2C:7-8(c)(1). All registered sex offenders are subjected to at least this level of notification. *See In re* Registrant, C.A., 679 A.2d 1153, 1157 (N.J. 1996).

60. *See* N.J. STAT. ANN. § 2C:7-8(c)(2).

61. *See id.* § 2C:7-8(c)(3).

62. *See* ALA. CODE § 15-20-22(a)(1) (Supp. 1997); ALASKA STAT. § 18.65.087 (Michie 1995); CAL. PENAL CODE § 290.4 (West 1988 & Supp. 1997); IDAHO CODE § 9-340(11)(f)(ii) (1990); IOWA CODE ANN. § 692A.13 (West Supp. 1997); KAN. STAT. ANN. § 22-4909 (Supp. 1997); MD. ANN. CODE art. 27, § 792(g)(4)(i) (1996); N.Y. CORRECT. LAW § 168-p (McKinney Supp. 1997); N.C. GEN. STAT. § 14-208.10 (Supp. 1997); N.D. CENT. CODE § 12.1-32-15 (Supp. 1997); OKLA. STAT. ANN. tit. 57, § 584(E) (Supp. 1997); OR. REV. STAT. § 181.587(I) (1993); PA. STAT. ANN. tit. 42, § 9798(d) (West Supp. 1997); S.C. CODE ANN. § 23-3-490(A) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1(5) (West 1996); UTAH CODE ANN. § 77-27-21.5(17) (1995); VA. CODE ANN. § 19.2-390.1(B) (Michie 1995); W. VA. CODE § 61-8F-5(b) (Supp. 1997); WIS. STAT. ANN. § 301.46(2)(e) (West Supp. 1996).

Oklahoma and Virginia restrict those who can request sex offender registry information to entities that provide services to children. *See* OKLA. STAT. ANN. tit. 57, § 584; VA. CODE ANN. § 19.2-390.1(B). Virginia also allows for the use of such information for the screening of current or prospective employees or volunteers who provide child care services. *See id.* § 19.2-390.1(C).

California, North Dakota, Oregon, South Carolina, and Wisconsin combine type I and type IV statute methods allowing notification both when necessary for public protection and upon request. *See supra* note 47 and accompanying text.

Alabama, Maryland, Oklahoma, Pennsylvania, Texas and West Virginia combine type II and type IV statute methods by listing people and entities that should be notified of dangerous sex offenders and allowing the release of such information upon request. *See supra* note 52 and accompanying text.

63. Idaho, Iowa, Maryland, North Carolina, South Carolina, Texas, Utah, and Wisconsin require that a request for sex offender registry information be made in writing. *See* IDAHO CODE § 9-340(11)(f)(ii); IOWA CODE ANN. § 692A.13(6); MD. ANN. CODE art. 27, § 792(g)(4)(i); N.C. GEN. STAT. § 14-208.10; S.C. CODE ANN. § 23-3-490(A); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1(5)(b)(2)(c); UTAH CODE ANN. § 77-27-21.5(17); VA. CODE ANN. § 19.2-390.1(C); WIS. STAT. ANN. § 301.46(2)(e).

64. Alabama and Kansas allow the public to inspect sex offender registration records at offices where such records are kept. *See* ALA. CODE § 15-20-22(a)(1); KAN. STAT. ANN.

phone lines that people can call to request sex offender registry information.[65] In addition, one state requires people requesting sex offender registration information to petition the courts.[66]

C. *The Need For Community Notification Under Megan's Laws*

No matter which method a state uses to notify the public about the presence of dangerous sexual predators, all of the Megan's Laws which have been enacted have a common theme: the belief that sexual predators pose a continuing danger to the community because of their high rate of recidivism which cannot be curbed by either the justice or mental health system.[67] By increasing public awareness of those sexual predators who are likely to repeat their crimes, community notification statutes seek to allow people to protect themselves and their children from repeat sex offenders by denying the sexual predators access to potential victims.[68] It is hoped that the next "Megan," aware that the man across the street is dangerous, will not go willingly into his house; in addition, informed neighbors and parents will keep a watchful eye on the sexual predator who lives across the street to ensure that he does not have the opportunity to lure another "Megan" into his home.[69]

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§ 22-4909.

65. California and New York have established sex offender 1-900 numbers. *See* CAL. PENAL CODE § 290.4; N.Y. CORRECT. LAW § 168-p.

66. *See* W. VA. CODE § 61-8f-5(b).

67. *See* Doe v. Pataki, 919 F. Supp. 691, 694 (S.D.N.Y. 1996). *See also* 1995 Alaska Sess. Laws 257, § 10(3) (noting that the "likelihood of the sex offenders engaging in repeat acts of predatory sexual violence is high" and "[s]exually violent predators generally have antisocial personality features that are unamenable to existing mental illness treatment modalities"); FLA. STAT. ANN. § 775.21(2)(b) (West Supp. 1997) (finding that violent and repeat sex offenders pose a "high risk of engaging in sexual offenses even after being released from incarceration or commitment"); PA. STAT. ANN. tit. 42, § 9791(a)(2) (noting that "sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments"). Some experts suggest that the recidivism rate of convicted sex offenders is as high as 40 to 75 percent. *See* Jerome, *supra* note 10, at 46.

68. *See* 142 CONG. REC. H4451, H4454 (daily ed. May 7, 1996) (statement of Rep. Schroeder); 142 CONG. REC. H4451-02, H4455 (daily ed. May 7, 1996) (statement of Rep. Jackson-Lee).

69. *See* Claire M. Kimball, *A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community*, 12 GA. ST. U. L. REV. 1187, 1195 (1996) (discussing the goals of Megan's Laws). *See also* 1996 Cal. Legis. Serv. 908(b) (West) (declaring that "[i]t is a compelling and necessary public interest that the public have information concerning [sexual predators] to allow members of the public to adequately protect themselves and their children from these persons"); COLO. REV. STAT. ANN. § 18-3-412.5(6.5)(a) (West Supp. 1997) (declaring that dissemination of sex offender

D. Why Potential Home Purchasers Need to be Informed Under Megan's Laws

The presence of a sexual predator in the neighborhood who poses a danger to children and imposes the need for extra vigilance can be seen as a detriment to the neighborhood, materially affecting the enjoyment and value of property.[70] Thus, the question arises whether potential home purchasers should be made aware of information on sexual predators before becoming members of the community.[71] Sex offender notification statutes are silent on notification procedures to be followed regarding potential newcomers to the community.[72]

Under the various Megan's Laws which have been enacted, police or other law enforcement officials have the duty of disseminating sex offender registration information to people living in areas into which dangerous sexual predators move.[73] If law enforcement authorities are given the additional duty of warning potential home purchasers of dangerous sexual predators, procedures for tracking people considering buying a home in those neighborhoods would have to be implemented in addition to the established procedures for tracking the movements of the sexual predators; this would greatly burden the police.[74]

In contrast, home sellers and real estate brokers are already in close contact with potential buyers as part of their efforts to sell homes. Additionally, home sellers are apprised of the presence of dangerous sexual predators in the neighborhood through their state's respective Megan's Law.[75] Real estate brokers, as agents of the home sellers,[76] are in a position to obtain information about sexual predators in the neighborhood from the home sellers.[77]

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information to the public is necessary to allow people "to adequately protect themselves and their children" from sexual predators).

70. *See* Ahearn, *supra* note 5, at N7.

71. *See* Schwaneberg, *supra* note 4, at 1; Inman, *supra* note 33, at H1.

72. *See* statutes cited *supra* note 43; Inman, *supra* note 33, at H1.

73. *See supra* Part II.B.

74. A 1994 report details how simply establishing procedures for registering sex offenders overburdened Californian police. *See* Aurelio Rojas & Thaai Walker, *Sex Offender Registration System Failing; Police Say its Outdated, Ignored—and Little Hindrance to New Crimes*, S.F. CHRON., Apr. 4, 1994, at A1.

75. *See supra* Part II.B.

76. *See* 12 C.J.S. *Brokers* § 25 (1980).

77. Many real estate brokers require sellers to disclose material information about a property before the brokers will agree to represent them. *See* Philip Lapatin, *Sale of House*

Courts and legislatures have already determined that sellers and real estate brokers have the duty to disclose structural deficiencies,[78] hazardous lead levels,[79] and various other home defects. Consequently, these two branches of government should similarly conclude that home sellers and real estate brokers are in the best position to inform potential purchasers of the presence of dangerous sexual predators in the neighborhood.

Residential sellers and real estate brokers, however, have no statutorily prescribed duty to disclose such information to potential purchasers.[80] Moreover, there is no direct common law precedent that places such a duty on residential sellers and real estate brokers.[81] While in two states real estate brokers are statutorily exempt from a duty to disclose sex offender information,[82] the same is not true of residential home sellers. Thus, in all but a handful of states, the issue of whether a residential home seller or real estate broker has a duty to inform prospective buyers of the presence of a dangerous sexual predator in the neighborhood has been overlooked.

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with Ghosts Might Return to Haunt You, SALT LAKE TRIB., Oct. 29, 1995, at D10 (noting that the National Association of Realtors advises brokers to condition representation of a seller on the seller's cooperation in disclosing things which would potentially be material to a real estate transaction); Jay Romano, *Realty Law Changing to: 'Let the Seller Reveal'*, PLAIN DEALER (Cleveland), Oct. 20, 1996, at 1F (describing private disclosure form which one realty company requires sellers to fill out before it will represent them). *Cf.* Strawn v. Canuso, 638 A.2d 141, 149 (N.J. Super. Ct. 1994) (noting that "[s]ince the brokers are agents of the seller, their duty to the purchasers is at least coextensive with that of the seller").

78. *See, e.g.* Layman v. Binns, 519 N.E.2d 642 (Ohio 1988); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982).

79. *See* 42 U.S.C. § 4852d(a)(1), (4) (1996).

80. *See* statutes cited *supra* note 43.

81. Louisiana's attorney general released an advisory opinion stating that the presence of a sex offender in a neighborhood would not have to be disclosed to prospective home purchasers. *See* Op. La. Att'y Gen. No. 94-332 (Sept. 2, 1994). Nor could homeowners be compensated for any decrease in property value attributed to a sex offender's presence in the neighborhood. *See id.* Such opinions do not have the effect of law, however, they are generally followed until the legislature or the courts formally decide the issue. *See* Ed Anderson, *Realtors Can't Lie About Sex Felons*, NEW ORLEANS TIMES-PICAYUNE, Sept. 28, 1994, at B2.

82. *See* MINN. STAT. ANN § 244.052(8) (West Supp. 1997); PA. STAT. ANN. tit. 42, § 9799.5 (West Supp. 1997).

III. The Duty to Disclose Unfavorable Information in Real Estate Transactions

Complicating the issue of whether home sellers and real estate brokers have a duty to disclose the presence of sexual predators to prospective purchasers is the fact that the information which home sellers and real estate brokers are required to disclose to potential buyers varies from state to state.[83] Depending on the state, residential home sellers and real estate brokers may have no duty to disclose any information to prospective purchasers,[84] they may have to disclose only information of which they are already aware and which is deemed material to the transaction,[85] or they may have a duty to actively seek out material information regarding a property and disclose it to prospective purchasers.[86]

Even in states in which home sellers or real estate brokers have no duty to disclose any information, they are still under a duty to refrain from fraudulently misrepresenting a property to a prospective purchaser.[87] Additionally, states requiring some form of disclosure differ as to the kind of information that must be disclosed.[88] A state that requires disclosure of structural defects[89] may or may not also require the disclosure of legal encumbrances affecting the property,[90] drainage problems,[91] termite

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83. *See* Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise Of Caveat Emptor*, 24 REAL EST. L.J. 291, 292 (1996).

84. *See* discussion *infra* Part III.A.

85. *See* discussion *infra* Part III.B.2.

86. A minority of states require real estate brokers to actively inspect a property for defects so that they can then be disclosed to buyers. *See* Easton v. Strassburger, 199 Cal. Rptr. 383, 390 (Cal. Ct. App. 1984) (holding that a real estate broker has a duty to conduct a "reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal"); Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc., 686 P.2d 262, 266 (N.M. Ct. App. 1984) (concluding that "[u]nder some circumstances, a broker may have a duty to disclose defects that an inspection would reveal"); Secor v. Knight, 716 P.2d 790, 795 n.1 (Utah 1986) (noting its approval of the *Easton* decision); Grube v. Daun, 496 N.W.2d 106, 113 (Wis. Ct. App. 1992) (observing that the state administrative code imposes a duty on brokers to conduct reasonably competent and diligent investigations to determine the existence of material facts which, then, must be disclosed).

87. *See* discussion *infra* Part III.B.1.

88. *See* discussion *infra* Part III.B.2.

89. *See* Layman v. Binns, 519 N.E.2d 642 (Ohio 1988); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982).

90. *See, e.g.*, Formento v. Encanto Bus. Park, 744 P.2d 22, 27 (Ariz. Ct. App. 1987) (imposing duty to disclose that property was subject to zoning laws); Gilbey v. Cooper, 310

infestations,[92] past murders on the property,[93] ghosts and poltergeists haunting the property,[94] the proximity of toxic waste dumps,[95] or a myriad of other matters which could conceivably affect the value and desirability of a particular property.

A. Caveat Emptor: No Duty to Disclose

Historically, the common law doctrine of caveat emptor[96] has governed the sale of real property in the United States.[97] Its precepts form the basis from which the modern law of real estate sales has evolved.[98] Under the doctrine of caveat emptor, home sellers and real estate brokers are under no duty to disclose unfavorable information about the condition of a property to potential purchasers in real property transactions.[99] Instead, caveat emptor assumes that all parties involved in a real estate transaction have the same capabilities and opportunities to gather information about the property.[100] Each party must look out for their own interests.[101] Therefore, buyers are able to discover

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N.E.2d 268, 270 (Ct. of C.P. Ohio 1973) (requiring disclosure that the property was encumbered by easements).

91. *See* Shane v. Hoffmann, 324 A.2d 532 (Pa. Super. Ct. 1974).

92. *See* Obde v. Schlemeyer, 353 P.2d 672, 674 (Wash. 1960).

93. *See* Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983).

94. *See* Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

95. *See* Strawn v. Canuso, 657 A.2d 420 (N.J. 1995).

96. The doctrine of caveat emptor provides in full, *caveat emptor, qui ignorare non debuit quod jus alienum emit*, "[l]et a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution." Alan M. Weinberger, *Let The Buyer Be Well Informed?—Doubting The Demise Of Caveat Emptor*, 55 MD. L. REV. 387, 388 n.5 (1996) (citing HERBERT BROOME, A SELECTION OF LEGAL MAXIMS 528 (1939)).

97. *See generally* Weinberger, *supra* note 95 (discussing the history and application of caveat emptor in real estate transactions).

98. *See id.*

99. *See* Quashnock v. Frost, 445 A.2d 121, 125 (Pa. Super. Ct. 1982) (noting that under the doctrine of caveat emptor "there is no duty to disclose no matter how unfair").

100. *See* Jones v. Texaco, Inc., 945 F. Supp. 1037, 1046 (S.D. Tex. 1996). This assumption arose from the fact that the doctrine of caveat emptor evolved at a time when society was agrarian in nature. *See* Weinberger, *supra note* 95, at 391-92. Houses were not equipped with central heating, electricity, indoor plumbing, or other modern conveniences; they were simple, pre-industrial structures whose construction and inner workings were easily comprehended by the ordinary buyer. *See id.* at 392. Under these circumstances, neither the seller nor the buyer had an advantage over the other; real property transactions were seen as "an arm's length proposition with wits matched against skill." *Id.*

101. "The doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission." Stambovsky v. Ackley, 572 N.Y.S.2d

unfavorable information about the property only through investigation and inquiry.[102]

B. *Limiting Caveat Emptor: The Duty to Disclose When Justice, Equity, and Fair Dealing Demand It*

In modern times, courts have become dissatisfied with strict adherence to the doctrine of caveat emptor because it allows sellers and real estate brokers to take advantage of a buyer's ignorance by remaining silent with respect to unfavorable conditions on a property.[103] In the modern economy, courts recognize that buyers are not necessarily equal to sellers and real estate brokers in their capabilities and opportunities to access information concerning real property that is for sale.[104] The seller, having lived on the property for some length of time, will be aware of some unfavorable information which cannot be discovered by a buyer, even with diligent investigation.[105]

Furthermore, the purchase of a home is the most important and expensive transaction that the average home buyer will ever undertake.[106] In addition, the average home buyer only under-

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672, 676 (N.Y. App. Div. 1991).

102. "As a general rule, [under the doctrine of caveat emptor] the burden is upon a purchaser of real property to discover defects." Van Deusen v. Snead, 441 S.E.2d 207, 210 (Va. 1994). Buyers are able to discover unfavorable information regarding a property on their own when unfavorable facts concerning a property are "open to observation" or "discoverable on reasonable inspection," and the buyer has the "unimpeded opportunity to examine the property." Layman v. Binns, 519 N.E.2d 642, 643 (Ohio 1988).

103. *See, e.g.*, Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985) (noting that "[o]ne should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance."); Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328, 1331 (Okla. Ct. App. 1976) (concluding that caveat emptor is "a doctrine that exalts deceit, condemns fair dealing, and scorns the credulous"); *Quashknock*, 445 A.2d at 131 (Spaeth, J., concurring) ("[I]t does not follow that law should be satisfied with saying, 'You can do anything so long as you don't actually cheat.'").

104. *See, e.g.*, Bevins v. Ballard, 655 P.2d 757, 763 (Alaska 1982) (noting that "[p]arties to real estate transactions frequently do not deal on equal terms"); McDonald v. Mianecki, 398 A.2d 1283, 1289 (N.J. 1979) (describing the average home purchaser as lacking "the skill and expertise necessary to make an adequate inspection" of a property); Michaels v. Brookchester, Inc., 140 A.2d 199, 201 (N.J. 1958) (noting that caveat emptor, while "suitable for the agrarian setting in which it was conceived" has "lagged behind changes in dwelling habits and economic realities" in the modern economy); Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968) (describing the doctrine of caveat emptor as "an anachronism patently out of harmony with modern home buying practices").

105. *See* Colgan v. Washington Realty Co., 879 S.W.2d 686, 691 (Mo. Ct. App. 1994). *See also supra* Part III.B.2.

106. *See* Strawn v. Canuso, 638 A.2d 141, 150 (N.J. Super. Ct. App. Div. 1994).

takes such a transaction once or twice in a lifetime.[107] In contrast, real estate brokers are professionals who deal with real estate transactions on a daily basis.[108] Real estate brokers hold themselves out to the public as experts in real property transactions.[109] Thus, buyers tend to rely on the expertise of real estate brokers.[110] Furthermore, many buyers fail to realize that the real estate broker is actually the seller's broker.[111] In recognition of these facts, many courts are willing to limit the application of the doctrine of caveat emptor and, instead, impose duties of disclosure on sellers and real estate brokers "whenever justice, equity, and fair dealing demand it."[112]

1. The Duty to Avoid Fraudulent Misrepresentation.—All states recognize the duty of home sellers and real estate brokers to avoid fraudulently misrepresenting[113] a property to purchas-

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107. *See id.*

108. *See* Easton v. Strassburger, 199 Cal. Rptr. 383, 390 (Cal. Ct. App. 1984).

109. *See Bevins*, 655 P.2d at 763.

110. *See Easton*, 199 Cal. Rptr. at 388. *See also* Kathy Barrett Carter, *State Justices to Decide if Developer Should Have Told Buyers of Landfill*, STAR-LEDGER (Newark, N.J.), Jan. 5, 1995, at 20 (noting that "one reason people go to real estate agents is they know neighborhoods and have the expertise to recommend areas they believe to be good values").

111. *See* Martin Dyckman, *Realtors Pushing Bill that Protects Them, Not Consumers*, ST. PETERSBURG TIMES, Mar. 17, 1996, at 3D; Christine M. Goldbeck, *License Reform Would Clarify Brokers' Duties*, E. PA. BUS. J., Apr. 1, 1996, at 14.

112. W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 31 (1936). *See also* Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (noting that the "law appears to be working towards the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it"); Posner v. Davis, 395 N.E.2d 133, 137 (Ill. App. Ct. 1979) (observing that the "modern trend in the law regarding the sale of a home is away from strict adherence to the doctrine of caveat emptor"); *Strawn*, 638 A.2d at 147 (declaring that "[c]onsistent with the doctrine of justice and fair dealing, caveat emptor . . . can no longer be immutable or inflexible"); Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328, 1331 (Okla. Ct. App. 1976) (recognizing that the "time had come . . . to recognize that the rule of caveat emptor is not founded on a high standard of morality and to outlaw use of this ally of dishonesty"); Quashknock v. Frost, 445 A.2d 121, 126 (Pa. Super. Ct. 1982) (stating that the "modern judicial trend is away from a strict application of the caveat emptor doctrine and towards the more fair and equitable doctrine").

113. The elements of fraudulent misrepresentation are: (1) a false representation of fact; (2) knowledge by the maker of the representation that the representation is false (or reckless disregard for the truth or falsity of the statement); (3) intent to induce the recipient to rely on the information; (4) justifiable reliance upon the representation by the recipient; and (5) damage to the recipient resulting from the reliance on the representation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162 (1979); RESTATEMENT (SECOND) OF TORTS §§ 525-526, 537, 541, 552C (1976); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, § 105, at 728 (5th ed. 1984).

ers.[114] Home sellers and real estate brokers cannot intentionally disclose inaccurate information which is material[115] to a purchaser's decision to buy property.[116] Nor can they actively conceal[117] material information about a property from buyers.[118] Such conduct interferes with buyers' capabilities and opportunities to gather information about a property and judge the merits of the transaction for themselves.[119] Therefore, when sellers and real

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114. *See generally* Paula C. Murray, *Aids, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689, 690-91 (1992) (discussing misrepresentation in the sale of real estate).

115. Under the Restatement of Torts, information is considered material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the misrepresentation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

RESTATEMENT (SECOND) OF TORTS § 538 (1976); The Restatement of Contracts describes information as material "if it would be likely to induce a reasonable person to manifest his assent" or "if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent." RESTATEMENT (SECOND) OF CONTRACTS § 162 (1979). Determinations as to the materiality of specific types of information are fact specific and, thus, vary from state to state.

116. *See, e.g.*, Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1004 (Ala. 1988) (broker failed to disclose a defect in the heating and cooling system of the house after direct inquiries by the buyers); Wedig v. Brister, 469 A.2d 783, 786 (Conn. App. Ct. 1983) (seller failed to reveal the illegality of sewage system in response to direct inquiry of buyer); Pinger v. Guaranty Inv. Co., 307 S.W.2d 53, 55 (Mo. Ct. App. 1957) (real estate agent falsely represented that house built on landfill was built on solid rock); McGerr v. Beals, 145 N.W.2d 579, 582 (Neb. 1966) (seller and real estate broker misrepresented that a house subject to flooding had a dry basement); Keith v. Wilder, 86 S.E.2d 444, 447 (N.C. 1955) (real estate agent falsely stated that land belonging to another party was part of property that was for sale); Smith v. Renant, 564 A.2d 188, 190 (Pa. Super. Ct. 1989) (real estate broker misrepresented major termite damage by describing it as being minor); Ware v. Scott, 257 S.E.2d 855, 856 (Va. 1979) (seller misrepresented that all water problems in house had been repaired even though flooding continued to be a problem).

117. The active concealment of a fact is regarded as the equivalent of a false statement of fact. *See* RESTATEMENT (SECOND) OF CONTRACTS § 160 (1979); RESTATEMENT (SECOND) OF TORTS § 550 (1976).

118. *See, e.g.*, Mitchell v. Skubiak, 618 N.E.2d 1013, 1016 (Ill. App. Ct. 1993) (carpeting glued to steps to conceal structural damage); A.S.I., Inc. v. Sanders, 835 F. Supp. 1349, 1351 (D. Kan. 1993) (drums containing toxic wastes buried on property); Barylski v. Andrews, 439 S.W.2d 536, 539-40 (Mo. Ct. App. 1969) (fire damage concealed by paint, paper, plaster, and wallboard); Flakus v. Schug, 329 N.W.2d 859, 862 (Neb. 1983) (two sump pumps hidden in holes in basement); May v. Hopkinson, 347 S.E.2d 508, 510 (S.C. Ct. App. 1986) (moisture and termite damage concealed by patching rotten areas and showing buyer repair estimates which omitted reference to damage); Van Deusen v. Snead, 441 S.E.2d 207, 209 (Va. 1994) (new mortar put in cracks around foundation of house and materials placed in front of cracks in basement).

119. *See Van Deusen*, 441 S.E.2d at 210.

estate brokers engage in such misrepresentation, buyers are relieved of their burden to protect their own interests under the doctrine of caveat emptor.[120]

Two courts have addressed misrepresentations involving sex offenders and sex crimes in connection with property transactions.[121] The first, the Texas Court of Appeals, held a real estate broker liable for a fraudulent misrepresentation[122] made to buyers regarding an accused sex offender who had formerly lived in the house which was sold to the buyers.[123] Prior to buying the home, the purchasers had asked the realtor who the previous owner of the house had been.[124] The realtor knew that the previous owner had been accused of molesting several children in the house.[125] Nevertheless, he told the purchasers that he did not know who the previous owner was.[126] The court concluded that the buyers' immediate attempt to cancel the transaction upon learning the truth about the previous occupant of the house[127] showed that the information was material to the transaction; the real estate broker's misrepresentation had induced the buyers into buying a home which they would not have bought otherwise.[128] Therefore, the court found that the real estate broker had committed a fraudulent misrepresentation by answering the buyers' direct inquiry untruthfully.[129]

Similarly, an Ohio court determined that a seller could be held liable for misrepresentations made to a buyer regarding sexual offenses which had taken place on the premises and in the

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120. *See* Van Camp v. Bradford, 623 N.E. 2d 731, 736 (Ct. of C.P. Ohio 1993).

121. *See* Sanchez v. Guerrero, 885 S.W.2d 487 (Tex. App. 1994) and *Van Camp*, 623 N.E.2d at 731.

122. The cause of action in this case was brought under Texas's Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (West 1987 & Supp. 1997). *See Sanchez*, 885 S.W.2d at 487. Many states have enacted consumer protection statutes which allow buyers to hold real estate agents liable for fraudulent misrepresentation without having to prove intent, reliance, or actual damages. *See generally* Elizabeth A Dalberth, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards*, 97 DICK. L. REV. 153 (1992) (discussing the duties of sellers and real estate brokers under consumer protection statutes).

123. *See Sanchez*, 885 S.W.2d at 487.

124. *See id.* at 492.

125. *See id.*

126. *See id.*

127. The buyers saw a news program on TV describing alleged acts of molestation which had occurred in the house. *See id.* at 489.

128. *See Sanchez*, 885 S.W.2.d at 492.

129. *See id.*

immediate neighborhood of the house that the buyer purchased.[130] Prior to purchasing the home, the buyer had asked the seller why there were bars on the basement windows.[131] The seller told the buyer that the bars were there due to a burglary which had occurred sixteen years earlier and that there was no current reason for their presence.[132] The seller did not mention, however, that the former occupant of the house had been raped, that the rapist had recently attacked women in neighboring homes, and that the rapist was still at large in the neighborhood.[133]

The court concluded that, since the buyer was a single mother who had two teenage daughters, the seller should have known that information about sex offenses which had recently occurred in the house and neighborhood would be important to the buyer's decision to purchase the house.[134] Therefore, the court concluded that such information was material to the transaction.[135] The court also noted that the buyer's inquiry about the bars on the windows was directed at obtaining information about the safety of the premises.[136] Because the seller's response misrepresented the safety of the premises, the court found that the response could be construed as either a fraudulent misrepresentation or a fraudulent concealment of a material fact.[137]

These two cases indicate that if a prospective purchaser directly asks a seller or real estate broker about the presence of sex offenders in the neighborhood, and the seller or real estate broker knows about the presence of dangerous sex offenders due to Megan's Laws, the seller or broker must answer truthfully or face potential liability for fraudulent misrepresentation or concealment.[138] In addition, these cases suggest that if a buyer asks about the identity of neighbors or the safety of the neighborhood,

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130. *See* Van Camp v. Bradford, 623 N.E.2d 731 (Ct. of C.P. Ohio 1993).
131. *See id.* at 734.
132. *See id.*
133. *See id.*
134. *See id.* at 740.
135. *See Van Camp*, 623 N.E.2d at 740.
136. *See id.*
137. *See id.*
138. In Louisiana, the State Attorney General's Office released an opinion which stated that although the state's registration and notification statutes contain no provisions obligating a seller to disclose the presence of a registered sex offender to prospective homebuyers, "[i]f asked if a sex offender lives in the neighborhood, [the seller] must reply honestly because to do otherwise would be fraudulent." Op. La. Att'y Gen. No. 94-332 (Sept. 2, 1994).

sellers and real estate brokers must disclose known information about dangerous sex offenders to the buyer.

2. *The Duty to Disclose Known Latent Defects.*—Without a direct inquiry by the buyer, however, sellers and real estate brokers who simply remain silent and say nothing about unfavorable conditions on a property that is for sale do not commit fraudulent misrepresentation even when they are fully aware of the unfavorable conditions.[139] Home sellers and real estate brokers can, nevertheless, be held liable for their silence when they fail to disclose their knowledge of unfavorable conditions which materially affect a property, but which are not open to observation or discoverable upon reasonable investigation by prospective purchasers.[140] Such conditions are known as latent defects.[141] Because latent defects are not discoverable even after diligent investigation,[142] courts are willing to relieve buyers of their ordinary burden under caveat emptor to discover these defects for themselves. Consequently, in the interests of justice, equity, and fair dealing, courts have recognized that home sellers and real estate brokers have a duty to disclose latent defects to prospective purchasers in two situations: when latent defects endanger the

139. "In the absence of a fiduciary relationship, mere nondisclosure of all material facts in an arm's length transaction is ordinarily not actionable misrepresentation unless some artifice or trick has been employed to prevent the representee from making further independent inquiry." Ramel v. Chasebrook Constr. Co., 135 So. 2d 876, 882 (Fla. 1961). Silence, however, may be actionable as negligent or innocent misrepresentation. *See* discussion *infra* Part III.B.2.a-b.

140. *See, e.g.*, Miles v. McSwegin, 388 N.E.2d 1367, 1370 (Ohio 1979) (noting that it is inappropriate to apply the doctrine of caveat emptor in cases involving latent defects whose presence "was not detectable by [the buyer] upon reasonable inspection"). *Accord* Lingsch v. Savage, 29 Cal. Rptr. 201 (Cal. Ct. App. 1963); Johnson v. Davis, 480 So. 2d 625 (Fla. 1985); Posner v. Davis, 395 N.E.2d 133 (Ill. App. Ct. 1979); Weintraub v. Krobatsch, 317 A.2d 68 (N.J. 1974); Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982).

141. *See* Layman v. Binns, 519 N.E.2d 642, 644 (Ohio 1988) (defining latent defects).

142. *See Miles*, 388 N.E.2d at 1370.

health and safety of buyers[143] and when latent defects are deemed material to the transaction.[144]

a. The Duty to Disclose Latent Defects Which Endanger Health and Safety.—Courts find that concerns about human safety, coupled with the principles of justice, equity, and fair dealing, are compelling reasons for concluding that there is a duty to disclose latent defects which endanger the health and safety of buyers.[145] A duty of disclosure will be found if a court determines that (1) a condition unreasonably dangerous to the health and safety of buyers exists; (2) the condition is latent;[146] (3) the seller or real estate broker has knowledge of the condition; and (4) the seller or real estate broker is aware, or should be aware, of the danger the condition poses to buyers.[147] Using this criteria, courts have

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143. *See, e.g.*, Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1005 (Ala. 1988) (noting that "if the [seller or real estate broker] has knowledge of a material defect or condition that affects health or safety and the defect is not known to or readily observable by the buyer, the [seller or real estate broker] is under a duty to disclose the defect and is liable for damages caused by nondisclosure"); Barab v. Plumleigh, 853 P.2d 635, 639 (Idaho Ct. App. 1993) (observing that "a vendor has a duty to disclose an unreasonably dangerous condition existing on the property"); Farm Bureau Mut. Ins. Co. v. Wood, 418 N.W.2d 408, 411 (Mich. Ct. App. 1987) (concluding that sellers are required to "disclose to the purchaser any concealed condition known to [the sellers] which involves an unreasonable danger"); Anderson v. Harper, 622 A.2d 319, 323 (Pa. Super. Ct. 1993), *appeal denied*, 634 A.2d 222 (Pa. 1993) (stating that the "modern view . . . holds that where there is a serious and dangerous latent defect known to exist by the seller, then [the seller] must disclose such defect to the unknowing buyer or suffer liability for his [or her] failure to do so").

But see Naramore v. Duckworth-Morris Realty Co. 669 So. 2d 946, 949 (Ala. Civ. App. 1995) (finding that a listing agent does not owe the buyers of a used home a duty to disclose defects affecting health and safety unless a confidential relationship exists between the parties).

144. *See* discussion *infra* Part III.B.2.b.

145. *See Barco*, 853 P.2d at 639. *See also* Shane v. Hoffman, 324 A.2d 532, 538 (Pa. Super. 1974) (finding that the "inundation of [a] basement with human excrement and other waste material involves such a clear hazard to the health of the occupants of [the] residence, that the duty to disclose said condition is evident"); W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 31 (1936), *quoted in* Obde v. Schlemeyer, 353 P.2d 672, 675 (Wash. 1960) (concluding that a termite infestation was "manifestly a serious and dangerous condition" so that "'justice, equity, and fair dealing' . . . demanded that the [sellers] speak").

146. *See supra* notes 137-38 and accompanying text.

147. *See* RESTATEMENT (SECOND) OF TORTS § 353 (1976) (describing liability for nondisclosure of dangerous conditions known to a vendor and unknown to a purchaser). *See also* Mercer v. United States, 432 F.2d 87, 88 (3d Cir. 1970) (noting approval of the use of section 353 of the Restatement to determine whether a duty to disclose a dangerous latent defect exists). *Accord* Louisville & Jefferson Co. M.S.D. v. City of Louisville, 451 S.W.2d 172, 175 (Ky. 1970); Carlson v. Hampl, 169 N.W.2d 56, 58 (Minn. 1969); Hut v. Antonio, 229 A.2d 823, 826 (N.J. Super. Ct. Law Div. 1967); Reckert v. Roco Petroleum Corp., 411 S.W.2d 199, 205 (Mo. 1966); Glanski v. Ervine, 409 A.2d 425, 430 (Pa. Super. Ct. 1979); Belote v.

found a duty to disclose such conditions as termite infestations,[148] defective sewage systems,[149] and concealed holes left in floors.[150]

The federal Megan's Law describes sexual predators as people who suffer from mental abnormalities which make them "a menace to the health and safety of other persons."[151] The various state Megan's Laws assert that disclosure of the presence of sexual predators to the public is necessary because sexual predators pose an extremely high degree of danger to people who live in close proximity to them; consequently, members of the community must be warned about their presence in order to protect themselves and their children from the danger.[152] Congress and the various state legislatures have, thus, already determined that sexual predators are dangerous to the health and safety of people living in close proximity to them. Courts should, therefore, make the same determination.

In addition, the presence of a sexual predator in a neighborhood is not an open and obvious condition that a purchaser can be expected to discover upon reasonable inspection of the property. Home sellers will be notified when a sexual predator moves into their neighborhood if, under their respective state's Megan's Law, it is determined that the sexual predator poses a danger towards them.[153] The Megan's Laws, however, do not contain procedures for notifying potential purchasers of the presence of sexual predators.[154] Thus, the presence of a sexual predator in a neighborhood is a dangerous latent defect that the seller will be aware of, but the buyer will not.

The presence of a sexual predator in the neighborhood does not, however, appear to be an unreasonable danger. A danger is made unreasonable when (1) the harm threatened is serious; (2) the

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Memphis Dev. Co., 346 S.W.2d 441, 442-43 (Tenn. 1961).

148. *See Obde*, 353 P.2d at 672. *But see* Swinton v. Whitinsville Savings Bank, 42 N.E.2d 808, 809 (Mass. 1942) (finding that the existence of a latent termite infestation does not justify imposing a duty of disclosure).

149. *See Shane*, 324 A.2d at 532.

150. *See Belote*, 346 S.W.2d at 441. The court noted that the hole, located in the attic of the house, was a latent defect because it had been covered over with boards; furthermore, it was dangerous because it created a "trap for any person who might thereafter have occasion to be in the attic for any purpose." *Id.* at 444.

151. 42 U.S.C. § 14071(a)(3)(D) (1994).

152. *See supra* Part II.C.

153. *See supra* note 43.

154. *See id.*

seller or real estate broker, has knowledge of the dangerous condition and need only disclose the danger to the buyer to allow the buyer to avoid the danger; and (3) the only way the buyer will discover the danger is to suffer serious harm.[155] For instance, a Tennessee court concluded that a large hole left in a floor and covered over by flimsy boards is unreasonably dangerous when not disclosed to purchasers because purchasers are not likely to discover such a hole until after someone has already fallen through the hole and been injured.[156] A Washington court determined that termites are unreasonably dangerous when not disclosed because if they are not disclosed, they will not likely be discovered; and, if undiscovered, the termites will destroy the structural integrity of a house.[157] A Pennsylvania court decided that a latent defect in a sewage system which causes the basement to flood with raw sewage is unreasonably dangerous because such a defect will not be discovered by the buyer until after the flooding has occurred, thereby causing harm to the purchasers.[158] In all these cases, the buyer is placed in a position of danger by the seller's non-disclosure. If sellers or real estate brokers who are aware of the latent danger do not disclose this information to buyers, then no one else will. As a result, the only way the buyers will discover the danger for themselves is to suffer harm.[159]

In the case of sexual predators identified under Megan's Laws, buyers will be placed in a position of danger by buying a house in a neighborhood in which a sexual predator lives. The sellers and real estate brokers will know of this danger; however, once the buyers actually move into the neighborhood law enforcement officials will have the duty, under their respective state's Megan's Law, to inform them of the danger. Once they actually become neighbors of a sex offender, buyers will be able to learn of the danger. Therefore, it is not clear that the interests of justice, equity, and fair dealing will be served by requiring disclosure of sexual predators under the justification that they are unreasonably dangerous to the health and safety of the buyers.

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155. *See* Shane v. Hoffman, 324 A.2d 532, 538 (Pa. Super. Ct. 1974); Obde v. Schlemeyer, 353 P.2d 672, 674-75 (Wash. 1960); Belote v. Memphis Dev. Co., 346 S.W.2d 441, 444 (Tenn. 1961).

156. *See Belote*, 346 S.W.2d at 444.

157. *See Obde*, 353 P.2d at 675.

158. *See Shane*, 324 A.2d at 538.

159. *See id.*

b. The Duty to Disclose Latent Defects Which Are Material.— Even if a latent defect is not considered to be unreasonably dangerous to the health and safety of buyers, courts may still find that home sellers and real estate brokers have a duty to disclose the defect if the defect is material[160] to the transaction.[161] To determine whether a latent defect is material to a transaction, the focus is not on the nature of the defect itself but on the effect such a defect has on the use and value of the property being sold.[162] The use and value of a property must be affected to such a degree that the buyer will be unable to make an informed decision when purchasing the property without full knowledge of the defect.[163] Silence about a material latent defect will, thus, cause buyers to lose the ability to watch out for their own interests and allow sellers and real estate brokers to receive an undeserved price for the property at the buyers' expense.[164] Under these circumstances, courts are willing to curtail caveat emptor in the interests of justice, equity, and fair dealing.[165]

Court decisions as to what specific kinds of latent defects will affect the value and desirability of property involve mixed questions of law and fact and, thus, vary from state to state.[166] Latent defects which have been found to be material by various courts include:

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160. *See supra* note 113.

161. *See* Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974) (finding that, although a cockroach infestation was not as serious a latent defect as a termite infestation, there was a genuine issue of material fact regarding whether the infestation was material to the transaction and the seller had a duty to disclose it to the buyer).

162. *See* Reed v. King, 193 Cal. Rptr. 130, 133 (Cal. Ct. App. 1983) (noting that "[i]f information known or accessible only to the seller has a significant and measurable effect on market value and . . . the seller is aware of this effect, [there is] no principled basis for making the duty to disclose turn upon the character of the information").

163. *See* Easton v. Strassburger, 199 Cal. Rptr. 383, 388 (Cal. Ct. App. 1984).

164. *See* Kaze v. Compton, 283 S.W.2d 204, 207 (Ky. 1955) (noting that the "criterion of materiality is whether it probably influenced the making of the contract, that is, whether the plaintiffs would have purchased the property for the price paid had they been apprised of these conditions"). *See also Weintraub*, 317 A.2d at 74 (noting the possible existence of a breach of the sellers duty of disclosure where the seller deliberately remained silent about a cockroach infestation because he knew that knowledge of the defect would cause the buyer to withdraw from the transaction).

165. *See, e.g., Reed*, 193 Cal. Rptr. at 130; Johnson v. Davis, 480 So. 2d 625 (Fla. 1985); Strawn v. Canuso, 657 A.2d 420 (N.J. 1995); Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991); Gilbey v. Cooper, 310 N.E.2d 268 (Ohio Misc. 1973); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982).

166. *See* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 389 (1995).

physical defects, such as leaking roofs[167] and cracked foundations;[168] non-physical defects, such as title and deed problems;[169] psychological defects, such as a house's reputation for being haunted[170] or for being the site of a brutal murder;[171] and off-site defects, such as hazardous landfills[172] and noisy neighbors.[173] There are no cases dealing directly with whether the presence of a sexual predator in the neighborhood should be considered a latent defect which is material to a property transaction. Cases dealing with off-site conditions which affect neighboring properties, however, indicate how a court might analyze a future sexual predator case.

For instance, in *Strawn v. Canuso*,[174] the New Jersey Supreme Court affirmed a lower court holding that residential developer-sellers and real estate brokers have a duty to disclose to buyers the existence of off-site conditions which (1) are unknown to the buyers, (2) are known, or should have been known, to the seller and the real estate broker, and (3) could reasonably be expected to materially affect the value or the desirability of the property involved in the transaction.[175] *Strawn* concerned a developer-seller and a real estate broker who had advertised a residential development as being located in a "peaceful, bucolic setting with an abundance of fresh air and clean lake waters."[176] The advertisement had failed to mention to prospective purchasers, however, that part of this bucolic setting consisted of a landfill containing hazardous wastes.[177] Purchasers, therefore, had bought homes in the seller's development unaware that a landfill containing hazardous waste was located less than one mile away.[178]

In determining whether the landfill could be considered material to property transactions occurring in the neighboring residential development, the *Strawn* court started from the basic assumption that "[l]ocation is the universal benchmark of the value and

167. *See Johnson*, 480 So. 2d at 625.
168. *See Thacker*, 297 S.E.2d at 885.
169. *See Gilbey*, 310 N.E.2d at 268.
170. *See Stambovsky*, 572 N.Y.S.2d at 672.
171. *See* Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983).
172. *See* Strawn v. Canuso, 657 A.2d 420 (N.J. 1995).
173. *See* Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Cal. Ct. App. 1992).
174. 657 A.2d 420.
175. *See id.* at 431.
176. *Id.* at 429.
177. *See id.* at 423, 429.
178. *See id.* at 429.

desirability of property."[179] Since the location of a landfill in an area can, by itself, cause neighboring property to drop in value, the court concluded that the location of a landfill could be material to property transactions occurring on neighboring property.[180] The court further concluded that in order to make a reasonable determination of whether a specific off-site condition could be expected to materially affect the value or the desirability of neighboring property, a person would have to possess expert knowledge on the marketability of properties and how off-site conditions such as landfills and superhighways can affect that marketability.[181] According to the *Strawn* court, while professional developer-sellers and real estate brokers have that expertise, the average residential buyer does not.[182] The professional sellers and real estate brokers will, under these circumstances, be better able to determine that a particular off-site condition is material to neighboring property than the residential home buyer.[183] The *Strawn* court concluded that since professional developer-sellers and real estate brokers are best able to determine which off-site conditions are material and, thus, deserving of disclosure, the law should impose upon them a duty to disclose such conditions to home buyers in the interests of justice and fair dealing.[184]

Similar to a landfill, the presence of a sexual predator in a neighborhood could affect the value and marketability of neighboring properties.[185] Given the choice, the average buyer would not want to live next to a sexual predator.[186] Having a sexual predator in a neighborhood would, thus, lead to a decrease in the value of the

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179. *Strawn*, 657 A.2d at 431-32.

180. *See id.* at 430.

181. *See id.* at 432.

182. *See id.*

183. *See id.*

184. *See Strawn*, 657 A.2d at 428, 431.

185. There have been various acts of vigilantism directed at sex offenders identified under Megan's Laws. *See* Kimball, *supra* note 69, at 1200. In one such incident, vigilantes burned down the house of a sex offender identified under his state's Megan's Law in order to drive the offender out of the neighborhood. *See id.* Such incidents indicate that people have strong negative feelings towards sexual predators, and, if given the choice, the average person would probably not buy a house next to a sexual predator.

186. *Cf.* Alexander v. McKnight, 9 Cal. Rptr. 2d 453, 456 (Cal. Ct. App. 1992) (noting that it is reasonable to assume that a prospective buyer would not want to move into a neighborhood where the neighbors are noisy and rowdy and would prefer to live in a quieter neighborhood).

houses in the neighborhood over time.[187] In addition, a home seller will be aware of the presence of a sexual predator in a neighborhood while a purchaser will not.[188] These factors seem to indicate that, under the *Strawn* test, the law should similarly impose upon a home seller a duty to disclose the presence of a sexual predator in the neighborhood to a buyer.

The *Strawn* court indicated, however, that there should be no duty to disclose "transient social conditions" to buyers.[189] According to the court, transient social conditions include such things as the changing character of a neighborhood, the presence of a group home in a neighborhood, and the deterioration of a neighborhood school system.[190] The court concluded that the issue of what effect such conditions will have on the value of neighboring property was either too speculative or too complicated for even the professional seller and real estate broker to comprehend.[191] The court reasoned that professional sellers and real estate brokers would not be able to obtain superior knowledge regarding such conditions and, therefore, should not be held to have a duty to disclose such information to the buyer.[192]

Sexual predators can move from a neighborhood if they choose. Therefore, they are transient. However, in the case of sexual predators identified under Megan's Laws, home sellers will have the advantage of superior knowledge over home purchasers. Sellers will know that dangerous sexual predators live in the neighborhood; purchasers will not. This lack of equality with respect to knowledge of a condition, possibly material to a property transaction, is the same type of situation in which the *Strawn* court imposed a duty of disclosure on professional sellers.[193] Therefore, it is possible that in the future, when a court is specifically analyzing the unique facts relevant to a sexual predator case, the *Strawn* test could be used to conclude that the presence of a sexual predator in the neighborhood is a material defect requiring disclosure by the home seller and real estate broker to the buyer.

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187. *See id.* at 456 (noting that a buyer "willing to assume headaches and other emotional discomfort in purchasing a residence will undoubtedly expect a discount for doing so").

188. Megan's Laws do not provide procedures for notifying prospective purchasers. *See supra* note 43.

189. *Strawn*, 657 A.2d at 431.

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.* at 432.

In *Alexander v. McKnight*,[194] a California court addressed the materiality of the presence of overtly hostile neighbors in a neighborhood, a condition the *Strawn* court might characterize as a "transient social condition." The *Alexander* court found that the presence of overtly hostile neighbors could depress the value of neighboring houses and, therefore, was a material fact which had to be disclosed to prospective purchasers of neighboring houses under California's real estate disclosure statute.[195] California's real estate disclosure statute specifically requires that sellers disclose neighborhood nuisances to buyers.[196]

The Alexanders were homeowners who lived next to the McKnights.[197] The McKnights routinely engaged in "offensive and noxious activities" on their own property, including operating a tree trimming business out of their house, using a noisy tree chipper at night, engaging in late night basketball games, and pouring motor oil on the roof of their house.[198] Following a suit brought by the Alexanders against the McKnights for nuisance and violations of restrictive covenants in the neighborhood, the McKnights were enjoined from engaging in objectionable and unlawful activities on

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194. 9 Cal. Rptr. 2d 453 (Cal. Ct. App. 1992).

195. *See* CAL. CIV. CODE §§ 1102-1102.16 (West Supp. 1997). State real estate disclosure statutes impose a duty on a home sellers to disclose a wide variety of conditions relating to a property that is for sale to prospective purchasers. *See generally* Washburn, *supra* note 165 (discussing the various real estate disclosure laws which have been enacted). A majority of states have enacted real estate disclosure statutes. *See* ALASKA STAT. §§ 34.70.010-.200 (Michie 1995); CAL. CIV. CODE §§ 1102-1102.16 (West Supp. 1997); 1995 Conn. Legis. Serv. 311 (West); DEL. CODE ANN. tit. 6, §§ 2570-2578 (1993); HAW. REV. STAT. §§ 508D-1 to -20 (Supp. 1995); IDAHO CODE §§ 55-2502 to -2518 (1994 & Supp. 1997); 765 ILL. COMP. STAT. ANN. 77/1 to /99 (West Supp. 1997); IND. CODE ANN. §§ 24-4.6-2-1 to -13 (Michie 1996); IOWA CODE ANN. §§ 558A.1-.8 (West Supp. 1997); KY. REV. STAT. ANN. § 324.360 (Banks-Baldwin 1997); ME. REV. STAT. ANN. tit. 32, § 13273 (West Supp. 1996); MD. CODE ANN., REAL PROP. § 10-702 (1996); MISS. CODE ANN. §§ 89-1-501 to -525 (Supp. 1997); NEB. REV. STAT. §§ 76-2, 120 (1996); NEV. REV. STAT. §§ 113.060-.150 (1995); N.H. REV. STAT. ANN. § 477:4-c (Supp. 1996); N.J. STAT. ANN. §§ 46:3c-1 to -12 (West 1997); N.C. GEN STAT. §§ 47E-1 to -10 (1995); OHIO REV. CODE ANN. § 5302.30 (Anderson 1995); OKLA. STAT. tit. 60, §§ 832 to 839 (Supp. 1997); OR. REV. STAT. §§ 105.456-.490 (1995); PA. STAT. ANN. tit. 68, §§ 1021-1036 (West Supp. 1997); R.I. GEN. LAWS §§ 5-20.8-1 to -11 (1995); S.D. CODIFIED LAWS §§ 43-4-37 to -44 (Michie 1997); TENN. CODE ANN. §§ 66-5-201 to -210 (Supp. 1996); TEX. PROP. CODE ANN. §§ 5.008, 5.094-.095 (West 1997); VA. CODE ANN. §§ 55-517 to -525 (Michie 1995); WASH. REV. CODE ANN. §§ 64.06.010 -.050 (West Supp. 1997); WIS. STAT. ANN. §§ 709.01-.08 (West Supp. 1996).

196. *See* CAL. CIV. CODE § 1102.6(C)(11).

197. *See* Alexander v. McKnight, 9 Cal. Rptr. 2d 453, 455 (Cal. Ct. App. 1992).

198. *See id.*

their property.[199] The court that granted the Alexanders' relief against the McKnights, however, also determined that if the Alexanders ever sold their house, they would have to disclose to purchasers the past activities of the McKnights because the California disclosure statute required that nuisances that have occurred on a property be disclosed by residential sellers to prospective buyers.[200] The *Alexander* court affirmed this finding.[201]

In so doing, the *Alexander* court noted that the provisions of the real estate disclosure statute must be interpreted liberally by California courts so that buyers will be fully informed about matters that affect the value of property that is for sale.[202] In addition, using reasoning similar to that in *Strawn*,[203] the *Alexander* court noted that determinations of whether a particular defect is material to a transaction are fact-specific and depend on the degree to which the defect impinges on the value or desirability of a property.[204] Unlike the *Strawn* court which stressed that only real estate professionals could understand how an off-site condition might affect the marketability of neighboring homes and, thus, become material,[205] the *Alexander* court noted that a trier of fact could make a determination on an off-site condition's materiality either on the basis of expert testimony or on his or her personal knowledge and experience.[206] Less reliant on specialized expert knowledge, the *Alexander* court found that it was reasonable to assume that a prospective buyer would not want to purchase a house in a neighborhood where the neighbors were hostile to each other.[207] This, in turn, would lead to a reduction in the market value of the neighboring property because buyers would not be willing to pay full price for a house that comes with the emotional discomfort of having to deal with hostile neighbors.[208]

Consequently, the *Alexander* court found that the presence of overtly hostile neighbors was material to property transactions occurring on neighboring properties and must be disclosed by sellers

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199. *See id.* at 454.
200. *See id.* at 455.
201. *See id.* at 456.
202. *See Alexander*, 9 Cal. Rptr. 2d at 455.
203. Strawn v. Canuso, 657 A.2d 420 (N.J. 1995).
204. *See Alexander*, 9 Cal. Rptr. 2d at 455.
205. *See Strawn*, 657 A.2d at 432.
206. *See Alexander*, 9 Cal. Rptr. 2d at 456.
207. *See id.*
208. *See id.*

to buyers.[209] The presence of a sexual predator in a neighborhood would have a similar depressing effect on property values. A sexual predator is an individual who has engaged in violent sexual acts against another in the past and is likely to do so in the future.[210] In comparison, the past activities of the hostile neighbors in *Alexander* seem almost innocuous. A court willing to find hostile neighbors as material to a transaction must take a similar view with respect to a sexual predator in the neighborhood.

IV. Conclusion

Megan's Laws stand for the proposition that people have a right to know when they are living in close proximity to a dangerous sexual predator.[211] This right to know is considered to be of the utmost importance in protecting the health and safety of the people who live in close proximity to sexual predators, especially children.[212] People considering moving into a neighborhood should have the right to know facts which will materially affect the value of their property and, more importantly, about situations that will threaten their welfare and safety. People have a right to know that they are moving into a dangerous situation. It would be unfair and unjust to simply allow a family to move next door to a dangerous sexual predator, unaware of that fact.

These considerations call for the requirement that prospective home purchasers be informed of the presence of dangerous sexual predators living in a neighborhood who have been identified under Megan's Laws before they make their decision to buy a house. Home sellers and real estate brokers are in the best position to notify prospective purchasers of the presence of dangerous sexual predators.[213] Therefore, they should be given the duty to do so. Application of this duty may impose a heavy burden upon home sellers and real estate brokers, but public policy, health, and safety considerations demand such an imposition.

Additionally, this duty must be imposed statutorily. The law of real estate transactions in the United States is far from uniform or static. The duties and obligations of home sellers and real estate

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209. *See id.*
210. *See* 42 U.S.C. § 14071(a)(3)(C) (1994).
211. *See supra* Part II.C.
212. *See supra* notes 148-49 and accompanying text.
213. *See supra* notes 73-78 and accompanying text.

brokers vary widely from state to state and are constantly evolving. Therefore, the various state legislatures must act to ensure the resolution of this current uncertainty regarding disclosure to prospective purchasers of the presence of a sexual predator.[214]

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214. This is true even if a particular state is unwilling to impose such a duty on residential sellers or real estate brokers.